No. 14,190

IN THE

United States Court of Appeals

For the Ninth Circuit

SUPERIOR SAND AND GRAVEL MINING CO., INC., a corporation,
Appellant,

vs.

TERRITORY OF ALASKA,
Appellee,

and

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON and GRACE D. SAXTON, Co-Partners Doing Business as the Northern Construction Association, and ELLSWORTH E. SAXTON, as Agent for Said Association,
Appellants,

vs.

TERRITORY OF ALASKA,
Appellee.

Appeal from the District Court of the Territory of Alaska, Third Division.

PETITION FOR A REHEARING OF APPELLANTS SCHUBERT, ET AL., DOING BUSINESS AS THE NORTHERN CONSTRUCTION ASSOCIATION, AND ELLSWORTH E. SAXTON, AS AGENT FOR SAID ASSOCIATION.

E. L. ARNELL,
202 Turnagain Arms, Anchorage, Alaska.

VERNE O. MARTIN,
Suite 3, 408 D Street, Anchorage, Alaska.

Attorneys for Appellants and Petitioners Northern Construction Association and Ellsworth E. Saxton, Agent.

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

FOREWORD.

The decision of the trial Court was to the effect that sand and gravel were not minerals under the mining laws of the United States. Upon appeal, this point was mentioned but not decided or discussed. The judgment of the trial Court was affirmed for the following reasons:

> "We are of the opinion that Congress can not be held to have intended the 1939 legislation to become effective as to lands under existing lease in the absence of the contemplated administrative regulations for the safeguarding of the interests and the protection of the rights of those holding under the Territory. A less stringent construction would tend, as this case amply demonstrates, to thwart the purpose which the Congress had in mind in setting apart these lands for the benefit of the territorial common schools. The statute, unclear as it is, must be interpreted in such manner as to effectuate its purposes, not to circumvent them. Accordingly we hold that the land was not open to mineral entry at the time appellants' locations were made, hence the locations are invalid."

Thus, the decision of this Court appears to be based upon a combination of statutory construction, Congressional intent, and public policy.

GROUNDS FOR REHEARING.

Appellants seriously contend that this Court failed to ascertain the true public policy involved or the true intent of Congress and has therefore failed to correctly interpret the statute involved. By its decision this Court has overruled an unbroken chain of Supreme Court cases extending over almost a century which clearly sets forth the public policy and defines the Congressional intent and purpose with regard to mineral lands included in school reservations or grants.

ARGUMENT.

The grant of Sections 16 and 36 in each section as school lands has never been an immediate grant of all such sections exclusive of reservations or restrictions. Grants to states have generally specifically excluded mineral lands: two principal exceptions to this statement are the grants to California and Utah. Even in the case of these two states the United States Supreme Court held that the grants did not include known mineral lands even though the states or their successors in interest had dealt with the lands as their own for many years (appellants' brief, pp. 33-34). An examination of these cases clearly shows that in granting school lands Congress intended to reserve known mineral lands from the grant for distribution under the mining laws even though it did not say so in the grant and even though the usual rules of statutory construction would normally result in a different conclusion. See particularly *United*

States v. Sweet, 245 U.S. 563. This is a long case and should be read in its entirety. It sets forth the history of the mineral versus school reserve conflict and clearly defines the public policy and Congressional intent and purpose as favoring the development of mines and mining at the expense of school reserves. When necessary to make a grant conform to this declaration of intent and policy, the Supreme Court read into the granting act a reservation of known minerals. This is absolutely opposite to the decision of this Court as to the Congressional purpose. It is to be noted that in the case of California and Utah the statute made an absolute grant, whereas in the case now before the Court there is merely a statutory reservation which may or may not ripen into a grant at such time as Alaska may become a state.

Congress, for almost a hundred years, has regarded the use of lands for mining purposes as of more benefit to the nation as a whole than the reservation of lands for school purposes. In the opinion of appellants, this was a wise decision, for the development of trade and commerce results in more financial benefit to the schools through taxes assessed upon the land involved and through increased tax returns from the development of the adjacent area than would result from the short term rental of school lands which precludes extensive economic development of the lands. Congress has preferred the validity of the claim of the mineral claimant over that of the state to school lands. In the case now before the Court, this Court

may take judicial notice of facts of common knowledge: The lands in question are within the boundaries of the Anchorage Independent School District and also of the City of Anchorage; each of these governmental units levies an annual 10 mill tax; the resulting tax on the two million dollar valuation (appendix to appellants' brief, page 3) would be $40,000 per year, which is more than the Territory has been able to derive from all the rentals on all reserved school lands since the passage of the 1915 Act.

Incidentally, the Territory is entitled to select other lands in lieu of the land in question.

> "* * * And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections 16 or 36 are mineral land * * *" 43 U.S.C.A. Sec. 851.
>
> "The lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character * * *" 43 U.S.C.A. Sec. 852.

These two sections further indicate a policy on the part of Congress to exclude mineral lands from school grants.

The historical development of legislation dealing with Alaska school lands clearly shows that the public policy and Congressional intent as defined in the *Sweet* case, supra, culminated in the passage of the 1939 amendment. The original 1915 Act reserved Sections 16 and 36 in each township in Alaska, not known to be mineral in character, from sale or set-

tlement for the support of the common schools, and gave the Territory the right to lease the land for periods not to exceed 10 years. This enactment failed to permit anyone, including the Territorial schools, from deriving any benefit from the later discovered minerals, from the timber on the land, or from any other materials on the land which might have some economic value. Since the 1915 Act limited Territorial leases to 10 years, the only possible source of income for the Territorial schools was from leases for agricultural purposes. It is a matter of common knowledge that very little of Alaska, whether school land or otherwise, is suitable for agricultural purposes and therefore the result of the 1915 Act was to prevent the Territorial schools from deriving any substantial benefit from the 1915 reservation. To correct this situation, Congress enacted the 1939 amendment. In effect the 1939 amendment provided that if the reserved school land contained valuable timber, the timber could be sold, if it contained coal or oil, or other minerals subject to the mineral leasing laws, it could be leased, if it contained other types of valuable minerals it was subject to disposition under the general mining laws. In any event, all the income would go to the Territory for school purposes. Congress, by the 1939 amendment, opened the door to mineral locations and placed Alaska school lands on a par with school lands in the various states—in each state school lands were subject to mining location unless the lands were not known to be of mineral character at the time of the actual grant (not at the time of earlier reservation prior to statehood).

In the light of the Congressional intent and purpose and the public policy outlined in the *Sweet* case, the 1939 amendment requires no strained construction. It then becomes perfectly clear. It is then apparent that if the crops or improvements of the Territorial lessee will be damaged by the mining operation, the mining operation cannot be conducted until compensation has been provided, but if mining operations can be conducted without injury to the crops or improvements of the Territorial lessee during the remainder of the term of his lease, as in this case, then the mining operation may continue. The authority of the Secretary of the Interior "to make all necessary rules and regulations" is permissive rather than mandatory—if he finds that rules and regulations are necessary he has the authority to make them. Since the rule making is permissive only, it cannot be a condition precedent to the validity of a mining location. It would be impracticable to require compensation to the lessee prior to discovery and location because the extent of compensation would be impossible to determine.

There was clearly no necessity for rules and regulations or the imposition of any conditions providing for compensation in this case at any time. The placer mining claims of appellants were located in October, 1950; application for patent was filed in the United States Land Office August 21, 1952. The complaints of the various adverse claimants were filed in the trial Court in the first quarter of 1953. At no time since the location of the placer mining claim has any Territorial lessee objected to the use or occupancy of

the lands by appellants; in fact, the record discloses from the uncontradicted testimony of appellants' witness (R. 71-77) that the Territorial lessees were making very limited use of the lands in question, so limited that the removal of sand and gravel by appellants from the unused portions could not conceivably have interfered with or damaged any crops or improvements of the Territorial lessees. Mining operations might have interfered with some future contemplated use, but the 1939 Act does not provide for compensation for loss of future contemplated use.

Therefore, no loss by any Territorial lessee being shown or even claimed, no objection having been made by any Territorial lessee to the use of the lands in question by the appellants, and no interference with or damage to any crops or improvements of any Territorial lessee being conceivably possible under the limited term of the leases, there was no necessity for rules or regulations by the Secretary of the Interior.

Wherefore, appellants respectfully request that a rehearing be granted in this cause.

Dated, Anchorage, Alaska,
August 12, 1955.

Respectfully submitted,
E. L. ARNELL,
VERNE O. MARTIN,
Attorneys for Appellants and Petitioners Northern Construction Association and Ellsworth E. Saxton, Agent.

Certificate

I, Verne O. Martin, one of the Attorneys for Appellants Northern Construction Association and Ellsworth E. Saxton, Agent, do hereby certify that in my judgment this Petition for Rehearing is well founded and I do further certify that the said Petition is not interposed for delay.

Dated, Anchorage, Alaska,
August 12, 1955.

Verne O. Martin,